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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT G. KAUCKY,

Petitioner,

v.

SOUTHWEST AIRLINES CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

BEN BARNOW
Counsel of Record
ALAN M. GOLDBERG
JUANITA H. CHEN
BARNOW AND GOLDBERG, P.C.
105 West Madison Street
Suite 2200
Chicago, Illinois 60602
(312) 621-2000

LARRY D. DRURY
LARRY D. DRURY, LTD.
105 West Madison Street
Suite 2200
Chicago, Illinois 60602
(312) 346-7950

Counsel for Petitioner

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Seventh Circuit erred in precluding Petitioner-Plaintiff from pursuing his suit against Respondent-Defendant airline, where the airline's choice not to remit wrongfully collected monies owed to millions of air travellers conflicts with procedures set forth in the Internal Revenue Code and recommended by the Internal Revenue Service.
2. Whether the determination of the United States Court of Appeals for the Seventh Circuit, in refusing to hold exceptions exist to the procedures set forth in the Internal Revenue Code, results in the lack of a remedy which significantly impacts a large segment of the population.

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PETITION FOR WRIT OF CERTIORARI

Petitioner-Plaintiff ("Plaintiff") Robert G. Kaucky respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit"), entered in this cause on March 20, 1997.

OPINIONS AND ORDERS BELOW

The denial by the Seventh Circuit of Plaintiff's petition for rehearing of the case is reprinted at page 22 of the appendix ("App."). *See also* 1997 U.S. App. LEXIS 7563 (7th Cir. Apr. 15, 1997).

The opinion and order of the Seventh Circuit affirming the dismissal of Plaintiff's case by the United States District Court for the Northern District of Illinois, Eastern Division ("District Court") is officially reported at 109 F.3d 349 (7th Cir. 1997) (Posner, R.A.) and reprinted at App. 1-9.

The minute order of the District Court denying Plaintiff's motion to alter or amend its judgment dismissing the case is reprinted at App. 10-11.

The memorandum opinion and order of the District Court dismissing Plaintiff's case for lack of jurisdiction is reprinted at App. 12-20. *See also* 1996 U.S. Dist. LEXIS 6750 (N.D. Ill. May 16, 1996).

The minute order of the District Court denying remand of Plaintiff's case to the Circuit Court of Cook County, Illinois, County Department, Chancery Division ("state court") is reprinted at App. 21.

JURISDICTION

Plaintiff brought this action in state court on January 24, 1996, alleging five causes of action under Illinois state law. On February 8, 1996, Respondent-Defendant Southwest Airlines Co. ("Defendant") removed Plaintiff's complaint on the basis that it presented a federal question under the Internal Revenue Code ("IRC"). On February 22, 1996, the District Court denied Plaintiff's motion to remand the case to state court. (App. 21).

On May 16, 1996, the District Court dismissed Plaintiff's complaint on the basis that it lacked jurisdiction to hear the case. (App. 12-20). On June 14, 1996, the District Court denied Plaintiff's motion to alter or amend its judgment of dismissal. (App. 10-11).

After Plaintiff appealed, the Seventh Circuit affirmed the District Court's order on March 20, 1997. (App. 1-9). On April 15, 1997, the Seventh Circuit denied Plaintiffs' petition for rehearing. (App. 22).

The jurisdiction of this Court to review the concerned judgment is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

26 U.S.C. § 4261
Imposition of tax

(a) In general.—There is hereby imposed upon the amount paid for taxable transportation (as defined in section 4262) of any person a tax equal to 10 percent of the amount so paid. In the case of amounts paid outside of the United States for taxable transportation, the tax imposed by this subsection shall apply only if such transportation begins and ends in the United States.

. . .

(g) Termination.—The taxes imposed by this section shall apply with respect to transportation beginning after August 31, 1982, and before January 1, 1996.

26 U.S.C. § 4291
Cases where person receiving payment must collect tax

Except as otherwise provided in section 4263(a), every person receiving any payment for facilities or services on which a tax is imposed upon the payor thereof under this chapter shall collect the amount of the tax from the person making such payment.

26 U.S.C. § 6415
Credits or refunds to persons who collected certain taxes

(a) Allowance of credits or refunds.—Credit or refund of any overpayment of tax imposed by section 4251, 4261, or 4271 may be allowed to the person who collected the tax and paid it to the Secretary if such person establishes, under such regulations as the Secretary may prescribe, that he has repaid the amount of such tax to the person from whom he collected it, or obtains the consent of such person to the allowance of such credit or refund.

(b) Credit on returns.—Any person entitled to a refund of tax imposed by section 4251, 4261, or 4271 paid, or collected and paid, to the Secretary by him may, instead of filing a claim for refund, take credit therefor against taxes imposed by such section due upon any subsequent return.

(c) Refund of overcollections.—In case any person required under section 4251, 4261, or 4271 to collect any tax shall make an overcollection of such tax, such person

shall, upon proper application, refund such overcollection to the person entitled thereto.

. . .

26 U.S.C. § 7421
Prohibition of suits to restrain assessment or collection

(a) Tax.—Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), and 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

. . .

26 U.S.C. § 7422
Civil actions for refund

(a) No suit prior to filing claim for refund.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(b) Protest or duress.—Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress.

. . .

(f) Limitation on right of action for refund.—

> (1) General rule.—A suit or proceeding referred to in subsection (a) may be maintained only against the United States and not against any officer or employee of the United States (or former officer or employee) or his personal representative. . . .

. . .

STATEMENT OF THE CASE

In 1995, airlines were required to collect a ten percent tax from travellers on transportation beginning and ending within the United States under 26 U.S.C. § 4261. The taxes imposed by § 4261 applied only to transportation beginning after August 31, 1982, and before January 1, 1996.

On December 6, 1995, President Clinton vetoed legislation that was to have extended the expiration date for collection of the federal excise tax under § 4261. Without an extension of the expiration date, collection of tax under § 4261 was only valid for travel through December 31, 1995. Although Congress had, in the past, extended the expiration date for § 4261 near the close of the Congressional session, such last minute passage of legislation was not expected before the close of the 1995 session. In fact, during that year, it became clear that the provision was not going to be extended. The media reported that Congress' failure to extend the expiration date of § 4261 would result in the loss of billions of dollars in revenue taken in by the Federal Aviation Administration used to run that agency.

On December 15, 1995, Plaintiff purchased round-trip tickets from Defendant for air travel in January 1996. At the time of purchase, Defendant charged Plaintiff ten

percent more than the fare on his tickets, purportedly as collection under the (expired) federal excise tax.

On January 22, 1996, after Plaintiff discovered that the federal excise tax applied only to travel through December 31, 1995 and realized that Defendant had wrongfully charged him a non-existent tax on his tickets, Plaintiff called Defendant's customer service department for remittance of his monies. Defendant refused Plaintiff's request for remittance of the improperly collected monies.

On January 24, 1996, Plaintiff filed a five-count complaint on behalf of himself and all others similarly situated against Defendant, on behalf of itself and all others similarly situated, in Illinois state court. Plaintiff filed the complaint in connection with Defendant's retention of and failure to remit the improperly collected monies to Plaintiff and the Class. The causes of action alleged in the complaint were 1) breach of contract; 2) reformation; 3) declaratory judgment; 4) statutory violation of 815 ILCS 205/2; and 5) conversion.

On February 8, 1996, Defendant removed the case to District Court on the basis of original jurisdiction under 28 U.S.C. § 1331. Defendant argued that it collected monies from Plaintiff under the mandate of § 4261, although a reading of the statute, on its face, revealed that collection of a tax from Plaintiff (who was travelling in 1996, outside the relevant dates of the statute), was not mandated under § 4261(g). Nevertheless, Defendant claimed that Plaintiff's complaint essentially sought the refund of a tax and accordingly, the complaint arose under the IRC. The District Court denied Plaintiff's motion to remand on February 22, 1996. (App. 21).

Thereafter, Defendant filed a motion to dismiss the case, claiming that Plaintiff had not followed the proper administrative procedures for claiming a tax refund as set forth in 26 U.S.C. § 7422. Defendant argued that Plaintiff was seeking a tax refund and under § 7422 actions for a refund may only be filed against the United States, and only after Plaintiff has first filed an administrative claim with the Secretary of Treasury. Defendant also argued that Plaintiff's claims were preempted by the Airline Deregulation Act of 1978, 49 U.S.C. § 1305(a)(1) (now 49 U.S.C. § 41713) ("ADA"). Plaintiff argued that because Defendant improperly collected monies under the guise of a tax and could not have collected a tax where none exists, Plaintiff could not be requesting the refund of a tax and should be allowed to file suit directly against Defendant under an exception to § 7422. Plaintiff also argued that the ADA did not preempt his claims for breach of contract and conversion. On May 16, 1996, the District Court dismissed Plaintiff's complaint, holding that it lacked jurisdiction to hear the case because Plaintiff had not filed a claim for a refund with the Internal Revenue Service ("IRS") and because his only source of relief was against the United States. (App. 12). Plaintiff filed a motion to alter or amend the judgment of dismissal which the District Court denied on June 14, 1996. (App. 10).

On August 26, 1996, Plaintiff timely filed an appeal of the District Court's ruling with the Seventh Circuit. On March 20, 1997, the Seventh Circuit affirmed the District Court's ruling, determining that although the suit could not literally be construed as one for a refund of taxes, Defendant merely collected the monies in error and exercised colorable authority to collect a tax under the statute because it had every reason to believe that

the tax would be extended beyond the December 31, 1995 expiration date. (App. 1). The Seventh Circuit failed to even address the argument against ADA preemption. On April 15, 1997, the Seventh Circuit denied Plaintiff's petition for rehearing. (App. 22).[1]

REASONS FOR GRANTING THE WRIT

By affirming the District Court's dismissal of Plaintiff's case, the Seventh Circuit severely limited the public's access to any remedy, including remedies under common law, when monies are taken from citizens under the pretense of a non-existent tax. Not only does the amount taken or withheld from air travellers, estimated to be as much as 400 million dollars, represent harm of great magnitude, the far reaching consequences of leaving the existing opinion stand go way beyond that amount.

Although Plaintiff alleged that Defendant acted in bad faith by improperly collecting monies under a nonexistent tax, and by possibly retaining such monies collected under the guise of a tax, the District Court denied Plaintiff the opportunity to conduct any discovery on his allegation. While the District Court properly took the allegations of Defendant's bad faith conduct to be true, it nevertheless dismissed the allegation as unfair, merely because historically, the tax had been continually re-

---

[1] On April 28, 1997, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the U.S. District Court, Northern District of Texas, Dallas Division, in favor of Defendant in a similar case. *See Sigmon v. Southwest Airlines Co.*, No. 96-10720. A similar appeal is presently pending before the United States Court of Appeals for the Ninth Circuit. *See Brennan v. Southwest Airlines Co., et al.*, No. 96-17053.

newed. (App. 15). The District Court basically excused Defendant's conduct without having any proper basis to do so. The District Court assumed that historical reenactment of the legislation gave Defendant proper justification for its collection, without looking any further into Defendant's intent behind its actions. This flies in the face of the facts in the record, particularly in light of the fact that President Clinton had vetoed the legislation which was to have extended the tax and there was no time for Congressional action to extend the tax before the expiration date. The District Court should have determined on the basis of the present facts before it, and not facts in the preceding forty years, that Defendant should not have expected renewal of the act, and further discovery on Defendant's bad faith conduct was warranted. In doing otherwise, the lower courts have bifurcated accountability for bad faith conduct.

The Seventh Circuit clearly recognized that Plaintiff "was, it is true, denied an opportunity to conduct discovery aimed at finding out whether [Defendant] had been acting in bad faith." (App. 7). Yet, much as the District Court had, the Seventh Circuit dismissed the importance of looking further into the allegations of bad faith, raising assumptions with no factual support. The Seventh Circuit assumed that "it was a good bet" that the tax would not expire at the end of 1995 (App. 6) and stated that, at worst, the bad faith conduct claimed by Plaintiff "is that [Defendant] was overconfident in believing that the tax would be extended and as a result failed to take the prudent measures that the larger airlines took to refund the excise taxes that they collected." (App. 7-8). Plaintiff had claimed that Defendant collected monies under the statute, not because it was uncertain as to the applicability of the statute, nor because Defendant was

confused and made a mistaken reading of the statute. In actuality, Plaintiff claimed that Defendant clearly recognized the inapplicability of the statute to tax on travel after 1995, yet nevertheless chose to collect monies from travellers under the guise of a tax. Even if Defendant claims otherwise, the failure to grant Plaintiff the benefit of discovery improperly denied Plaintiff any opportunity to disprove Defendant's assertions. To do so with the assumption of bad faith rattles existing concepts of jurisprudence.

Where there is conflicting evidence before a court which necessitates discovery, such discovery should not be denied in the search for truth. In this instance, the Seventh Circuit was faced with conflicting evidence which should have led it to question the plausibility of Defendant's claims, and which potentially supported Plaintiff's claim of bad faith conduct on the part of Defendant. For instance, Defendant's affiant stated that the collected money had been turned over to the IRS. However, separate evidence showed that Defendant's director of public relations asserted that the monies were in fact being held in an escrow account. Evidence also shows the affiant contradicting her affidavit in her deposition testimony, by stating that the payment of monies to the IRS was not for the excise tax in question.

The Seventh Circuit further dismissed the need for discovery by claiming that it made no difference where the collected money was located, the reason given being that the principal is bound by the agent's act. The Seventh Circuit's rationale conflicts with a general principle of law. To hold the principal liable for monies remitted to it by its agent, such remittance must have been in good faith. *John L. Burns, Inc. v. Gulf Oil Corp.*, 208 F. Supp.

222, 223 (N.D. Ga. 1967) ("where money is paid to an agent as the result of a mistake, and the agent in turn paid the money in good faith to his principal, the correct remedy of the payor is in an action against the principal and not the agent"). Accordingly, the principal is not always bound by the agent's act. Evidence exists which points to the possibility that the improperly collected monies, if actually turned over to the IRS as claimed by Defendant, were turned over to the IRS after filing of the suit. Discovery would have aided in determining whether such remittance was made by Defendant in bad faith as an attempt to avoid responsibility for its wrongful collection of monies under the guise of a tax.

By failing to necessitate discovery, the Seventh Circuit effectively vitiates the vital role discovery plays in the judicial system. Both the District Court and the Seventh Circuit recognized that bad faith conduct existed on the part of Defendant, and discovery would have determined the scope of such bad faith conduct. By summarily dismissing Defendant's bad faith conduct, the Seventh Circuit has sanctioned acts which conflict with the IRC and IRS recommended procedures and has failed to address the possible exceptions to IRC procedures which arise when collection was made in the guise of a tax and when an implied cause of action is found.

I.

THE SEVENTH CIRCUIT'S DETERMINATION CONFLICTS WITH THE PROCEDURE SET FORTH IN THE INTERNAL REVENUE CODE AND RECOMMENDED BY THE INTERNAL REVENUE SERVICE.

By allowing Defendant to pass on the ramifications of its bad faith collection to the IRS to deal with, the

Seventh Circuit has allowed Defendant to act in conflict with the legislation which addresses situations such as this which involves millions of claims, and to act in conflict with the recommendations specifically set forth by the IRS to return the improperly collected monies to the consumer. The Seventh Circuit has caused the IRS to bear the administrative costs of returning the money rather than requiring such redress to be provided by the wrongful collector.

The evidence in the lower court proceedings revealed that the IRS urged the airlines to handle the situation themselves in making remittance of the monies to the consumers. The IRS stated that consumers to whom the tax did not apply were entitled to remittance of collections made by the airlines. It is believed that while the IRS stated that claims could be filed by individual consumers using Form 8849, the IRS had requested airlines to follow 26 U.S.C. § 6415 to remit the improperly collected monies to consumers. Under § 6415, carriers are allowed to directly remit monies to consumers from whom the carrier made a collection. The carriers are then entitled to claim a credit against subsequent returns to offset the amount of remittance to its customers. This procedure affords the IRS the opportunity to minimize confusion,[2] to minimize the number of claims filed by individuals, and to maximize reimbursement to individuals properly entitled to one.

Despite the IRS' reported position, Defendant claimed submitting a claim to the IRS was an adequate remedy.

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[2] The evidence showed that Form 8849 was not actually intended for such claims, although an exception was being made by the IRS in this instance.

To counter the evidence indicating that Form 8849 leads to an inadequate remedy for consumers, Defendant asserted that Form 8849 was not the proper form, that the District Court had identified Form 8849 to be used when the IRS has prescribed Form 843 as the proper form to use. In fact, the evidence submitted supports the claim that the IRS recommended Form 8849 to airlines as the form to be used. By focusing on evidence that indicates that the IRS itself is unclear when directing which form is the proper form to be used in filing a claim, Defendant only serves to point out the confusion the public is faced with when requesting that remittance be made of the improper collection. By returning the monies under § 6415, Defendant can easily prevent such confusion.

Regardless of which form the consumer uses to file a claim, the exhibits to the District Court pleadings point out that the average consumer will likely fail to be afforded any relief by filing an IRS form. The exhibits clearly indicate that the IRS has stated that original tickets be submitted in order for the IRS to honor the claim. However, in the majority of the cases, the original ticket stub has long ago been discarded or lost by travellers. Additionally, to get a copy of the ticket from airlines, consumers are generally charged a fee by the airlines, which basically negates any reimbursement they may eventually receive through filing a claim with the IRS.

The public has been denied an adequate remedy in that many, if not most, consumers are unaware that they are due a remittance of the monies collected from them. Those who are aware that they are owed money are unable to request remittance from the IRS, as shown *supra*. Requiring Defendant to follow § 6415 and directly

remit the improperly collected monies to consumers would reach the great majority of the population owed a return of their monies. Defendant has records on individuals from whom it improperly collected money; in an earlier hearing in the District Court, the attorneys for Defendant guaranteed the retention of all ticket copies. Individuals would not need to have retained their original ticket for remittance as Defendant already has the information in its records. In contrast, the IRS has no means of contacting those who travelled outside the scope of the statute and can only process each claim individually as they come in.

Requiring the IRS to process each claim individually generally offers no remedy to the claimant and is extremely costly. It is easier and more efficient for Defendant to process the claims altogether, and further, such remedy is intended by the tax laws. The court in *DuPont Glore Forgan Inc. v. American Tele. and Tele. Co.*, 428 F. Supp. 1297 (S.D. NY 1977), recognized that the purpose of § 6415 was:

> [T]o provide mechanisms for lessening the burden of administering a tax which is imposed on a large number of taxpayers paying a relatively small amount of tax on each taxable transaction. It eliminates the necessity of individual taxpayers filing refund claims for each overpayment of an excise tax by allowing refunds to be made to the collecting agent for all of its customers . . . and ensures that the ultimate economic benefit . . . is passed on to the taxpayer.

DuPont, 428 F. Supp. at 1304-1305. By requiring Defendant to remit the improperly collected monies to consumers under § 6415, the consumers are guaranteed a remedy and Defendant is ensured a credit from the IRS.

To hold otherwise results in the lack of a remedy to the vast majority of the consumers. While the Seventh Circuit recognized that following § 6415 was an appropriate way to proceed, it nevertheless found no fault in Defendant throwing responsibility to its customers to file a claim with the IRS for a return of the monies. By so holding, the Seventh Circuit failed to protect the public by failing to recognize the conflicts raised with the IRC and with the IRS, and the resultant lack of an appropriate remedy to the public.

II.

THE SEVENTH CIRCUIT'S FAILURE TO RECOGNIZE EXCEPTIONS TO PROCEDURES SET FORTH IN THE INTERNAL REVENUE CODE RESULTS IN A LACK OF REMEDY TO THE PUBLIC.

By not recognizing two exceptions to the IRC procedures, the Seventh Circuit leaves the court system with no means to police corporate entities such as Defendant from engaging in such manipulation of the tax system, the IRS is left with no assistance in properly remitting wrongfully collected funds to the public, and the majority of the air travelling public is left with no adequate access to the funds owed them. An exception to the limitation on bringing suit under § 7422 affords a proper remedy to the public, as does an implied cause of action under § 6415.

This Court has previously held that an exception exists to 26 U.S.C. § 7421, which prohibits suits for injunctions seeking to prevent the assessment and collection of a federal tax, the exception being when collection would be made under the guise of tax. If it can be shown that

"under the most liberal view of the law and the facts" that the collection is not valid, in such situations the collection is "merely in the 'guise of a tax'." *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7, 8 L. Ed. 2d 292, 297, 82 S. Ct. 1125 (1962). As collection was attempted where no actual tax existed, this Court allowed the suit in *Enochs* to prevent such a collection to proceed, allowing an exception to the prohibition of § 7421.

A similar exception exists for § 7422, which limits suits for refunds. Plaintiff previously pointed out that Defendant had no applicable statute to support its collection of monies from Plaintiff and that applying the test from Enochs revealed that Defendant's collection was made in the "guise of a tax". The District Court determined that "[Plaintiff] says rightly that it cannot be established under the most liberal view of the land and the facts that Defendant's exaction was authorized by the Internal Revenue Code." (App. 16). Despite recognizing that Defendant's collection of monies was unauthorized, the District Court failed to find that collection was made under the guise of a tax and stated that there was no reason to grant an exception to § 7422. In support of its determination, the District Court looked at whether there was the possibility of an adequate remedy. The District Court stated that the difference lay between the availability of an adequate remedy in an action for an injunction and in an action for a refund.

The District Court felt that an exception to § 7421, allowing suit for an injunction, is necessary because an injunction is possible only when there is no adequate remedy at law to avoid a future or ongoing harm. (App. 16). The District Court determined that in a suit for a

refund of a tax, the harm is already complete and the IRC provides an adequate remedy at law to obtain a refund. (App. 16-17). Thus, the District Court felt that an exception to § 7422 was unnecessary. Yet under the District Court's rationale, an exception to § 7422 should be allowed to exist. Using the same logic, a suit for a refund should be possible only when there is no adequate remedy at law to avoid a future or ongoing harm. Such is the situation before this Court. The suit for an injunction in *Enochs* was allowed to proceed because collection was attempted under the guise of a tax. No valid tax existed for the collection. The District Court should have allowed the suit for a refund of the monies collected to proceed because the collection was made under the guise of a tax. No valid tax existed for the collection. Additionally, the District Court had no support for its conclusion that the public is afforded an adequate remedy under the IRC in this situation. As shown, *supra*, there is no adequate remedy at law for consumers to regain the improperly collected funds. The District Court's belief that filing Form 8849 leads to a simple resolution is unfounded and fails to distinguish between a theoretical remedy at law and an adequate remedy at law. (App. 18).

The Seventh Circuit failed to properly address the guise of a tax issue or apply the "most liberal view of the land and facts" test to Plaintiff's case. The importance of ensuring that customers are returned their money in situations where no valid tax was involved necessitates an exception to § 7422. This Court should allow an exception to § 7422, such as it previously allowed under § 7421, to protect the public interest. Defendant's collection was made under the guise of a tax, not under mandate of the IRC, and Plaintiff should not be required to

follow the requisites of § 7422, which are in place for valid tax matters.

In addition to the exception to § 7422 allowing a cause of action for refund of monies collected without a valid statute, an implied cause of action should have been found to exist under § 6415. This Court previously set forth a four-part test to assist in the determination of whether an implied cause of action exists. In *Cort v. Ash*, 422 U.S. 66, 78, 45 L. Ed. 2d 26, 36, 95 S. Ct. 2080 (1975), this Court asked, 1) did the statute create a federal right in favor of the plaintiff; 2) was there legislative intent to create or deny such a remedy; 3) was it consistent with the underlying purposes of the legislative scheme to imply a private cause of action; and 4) is the cause of action traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

In applying the *Cort* test to Plaintiff's case, an implied cause of action may be found to exist under § 6415. Defendant is mandated by § 6415 to return its improper collection to the person(s) entitled thereto, and can thereafter apply for a credit from the IRS to offset its return of monies. Thus, the first prong of the test is met, § 6415 creates a federal right in favor of Plaintiff. Applying the second prong of the test also supports Plaintiff's argument for a private cause of action under § 6415. As discussed, *supra*, the court in *DuPont* recognized that the legislative intent behind § 6415 was to create a remedy, not deny one, in order to lessen the burden on the IRS and ensure that the ultimate economic benefit is passed on to the customers. The third prong of the test asks if

it is consistent with the underlying purposes of the legislative scheme to imply a private cause of action under § 6415. Not only was Defendant mandated by § 6415 to remit to its customers the improperly collected monies, Defendant had been urged by the IRS to follow the statute as well. Despite the language of the statute and the request of the IRS, Defendant chose to ignore its required role in returning the monies. Unless a private cause of action is allowed against Defendant to enforce it to meet its responsibility in remitting the improperly collected monies, the legislative scheme will not be met and millions of customers will be left with no remedy. Allowing a private cause of action is entirely consistent with the legislative scheme of lessening the burden on the IRS and ensuring that the ultimate economic benefit is properly passed on to the customers. Finally, the fourth prong of the *Cort* test also supports a finding of an implied cause of action under § 6415. This suit was removed from state court on the basis that it was basically a suit for a refund of taxes and that the IRC applied. It should be emphasized that Plaintiff continues to assert removal was improper because collection of monies was made in the guise of a tax, and simply the wrongful taking of money, and thus his suit is not one for refund of taxes. The Seventh Circuit appeared to agree with Plaintiff's stance in part, when it stated that "[i]n a literal sense this is not a suit for a refund of taxes." (App.3). However, in accordance with the determination that the IRC applies, should this Court agree that the IRC applies, questions involving the IRC are not traditionally relegated to state law and it is not an area basically the concern of the states. Accordingly, it is not

inappropriate to infer a cause of action based solely on federal law.

The Seventh Circuit concluded that an implied cause of action could not be found to exist under § 6415, without applying the *Cort* test. While the Seventh Circuit recognized that the provision was likely designed to spare individuals and the IRS the burden of preparing and processing relatively small claims, it nevertheless stated that "[w]hatever the provision's precise scope, there is no express authorization for suits by taxpayers to enforce it; no indication that Congress would have wanted the courts to entertain such suits despite the absence of express authorization" (App. 8). In failing to apply the *Cort* test to Plaintiff's suit, the Seventh Circuit comes to an improper conclusion resulting in an inadequate remedy to consumers.

CONCLUSION

The Seventh Circuit's holding creates potential conflicts with the IRC and the IRS which this Court needs to address. Additionally, by leaving consumers without a means of enforcing a remedy, the Seventh Circuit has negatively impacted the public at large. The Seventh Circuit erred in failing to properly address the issue of Defendant's bad faith, in failing to address the ramifications of Defendant's collection made in the guise of a tax, and failing to apply the *Cort* test. Hundreds of millions of dollars which were improperly extracted from consumers remain unreturned, without any real means of returning the money to the proper hands.

For the foregoing reasons, Petitioner-Plaintiff Robert G. Kaucky respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

BEN BARNOW
Counsel of Record
ALAN M. GOLDBERG
JUANITA H. CHEN
BARNOW AND GOLDBERG, P.C.
105 West Madison St.
Suite 2200
Chicago, Illinois 60602
(312) 621-2000

LARRY D. DRURY
LARRY D. DRURY, LTD.
105 West Madison St.
Suite 2200
Chicago, Illinois 60602
(312) 346-7950

Counsel for Petitioner

IN THE
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FOR THE SEVENTH CIRCUIT

No. 96-2736

ROBERT G. KAUCKY, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

SOUTHWEST AIRLINES COMPANY, on behalf of itself and all others similarly situated,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 750—**James B. Zagel**, *Judge.*

ARGUED JANUARY 10, 1997—DECIDED MARCH 20, 1997

Before POSNER, *Chief Judge*, and RIPPLE and ROVNER, *Circuit Judges.*

POSNER, *Chief Judge.* Section 4261 of the Internal Revenue Code required airline passengers to pay a 10 percent excise tax on domestic air transportation commenced on or before December 31, 1995, and required the airlines to collect the tax from its customers, 26 U.S.C. § 4291, and remit the proceeds twice a month to the Internal Revenue Service. 26 C.F.R. § 40.6302(c)-1(b)(1)(i). Failure to collect and remit would have subjected the airlines to heavy penalties. 26 U.S.C. §§ 6672, 7202, 7501. In mid-December 1995, shortly after the President had vetoed

a bill that would have extended the excise tax into 1996, Robert Kaucky bought two tickets from Southwest Airlines for travel in January 1996. The price that he paid included the 10 percent excise tax. Apparently Southwest remitted the amount it received from Kaucky for the fax to the IRS, although this is not absolutely certain. Kaucky was not subject to the tax, because his tickets were not for travel on or before December 31, 1995.

Kaucky brought suit in an Illinois state court, on behalf of himself and others who had bought tickets from Southwest in 1995 but not flown until 1996, against Southwest, seeking on grounds of conversion and breach of contract the recovery of the money that they had paid to the airline in respect of the nonexistent tax. He purported to sue Southwest not only in its own right but also as a representative of all other airlines that had engaged in the same practice. Defendant classes are sometimes permitted under both federal and state law (remember this case began in state court). Fed. R. Civ. P. 23(a); 735 ILCS 5/2-801; 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1770 (2d ed. 1986). Given the relatively small number of airlines and (as we shall see) the disparity in their handling of the expired tax, it is doubtful that defendant class action treatment would be appropriate here. In any event no class was certified, and we shall therefore treat this as a suit against Southwest alone.

Southwest removed the case to federal district court on the ground that the plaintiff and his class were really seeking a refund of federal taxes. That would make this a suit arising under federal law (and hence removable under 28 U.S.C. § 1441(b)), specifically the Internal Revenue Code, which authorizes claims against the Internal Revenue Service, and, if the claims are denied, suits in federal court against the United States, for the recovery of any federal tax alleged to have been erroneously or illegally assessed or collected. 26 U.S.C. § 7422(a); 28 U.S.C. § 1346(a)(1). The district judge agreed that Kaucky's suit actually arose under federal law, and therefore denied the

plaintiff's motion to remand the case to the state court. He then dismissed the suit because a suit for the refund of federal taxes may be brought only against the government, and not against a private person. *Columbia Marine Services, Inc. v. Reffet Ltd.*, 861 F.2d 18, 22 (2d Cir. 1988); see also 26 U.S.C. § 7422(f)(1); *Edgar v. Inland Steel Co.*, 744 F.2d 1276, 1278 (7th Cir. 1984) (per curiam). Kaucky had not only not sued the government; he had not filed a claim for refund, which is a precondition to bringing such a suit. 26 U.S.C. § 7422(a); *Kuznitsky v. United States*, 17 F.3d 1029, 1031 (7th Cir. 1994). Of course if Kaucky were not the taxpayer—if Southwest were—he could not ask for a refund or bring a refund suit. But the airline passenger is the taxpayer, 26 U.S.C. § 4261(d), and is entitled to a refund or credit if he pays a tax that he does not owe, §§ 6401(c), 6402(a); the question is whether in suing Southwest, passenger-taxpayer Kaucky was seeking a tax refund.

If he was, the suit was properly removed to the district court despite the plaintiff's effort to base the suit on state law grounds and his failure to name the United States as the defendant. When federal law creates an exclusive remedy for some wrong, displacing any remedy that the states may have created for it, a suit to redress that wrong necessarily arises under federal law. There is no state law for it to arise under because the state law that the plaintiff thought he was suing to enforce has been pushed to one side, and replaced, by the federal law. *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483, 1487 (1995); *English v. General Electric Co.*, 496 U.S. 72, 79 (1990); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987); *Graf v. Elgin, Joliet & Eastern Ry.*, 790 F.2d 1341, 1344-45 (7th Cir. 1986). But if this is not a suit for a refund of taxes, then removal was improper even if Southwest has a defense based on federal law. *Caterpillar, Inc. v. Williams, supra*, 482 U.S. at 393; *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993).

In a literal sense this is not a suit for a refund of taxes, because the plaintiff and the members of his class never

paid the air transportation excise tax. Money was collected from them to pay the tax if and when it was imposed on air travel taking place in 1996; but the tax was not imposed. Even if (as we assume) Southwest remitted the money it collected on account of the excise tax to the Internal Revenue Service, this did not automatically transform the money that it had collected into a "tax." Not all the money that the Internal Revenue Service receives is tax; it receives an annual appropriation from Congress, as well; and no doubt from time to time some deluded taxpayer sends in money for the payment of a tax that, unbeknownst to him, has expired.

But we do not think the literal sense is the right sense. If it were, then anytime a taxpayer thought he could prove that his employer had erroneously withheld a portion of his salary for federal income tax he would have an action in state court against the employer. The state court might side with the taxpayer and order the employer to refund him the money. The federal government, not having been sued in the state court—indeed not having consented to be sued in state courts and so not having waived its sovereign immunity from suit in those courts—would not be bound by the judgment. It might therefore refuse to credit the employer with the amount of tax that the state court had ordered refunded to the employee—and then the employer would be caught in the middle. We do not think that such a result was intended or would be consistent with the system of federal tax collection that Congress has created. The specific illustration that we have given is nixed by 26 U.S.C. § 6401(c), which provides that an overpayment of tax does not lose its character as a tax for which the taxpayer is entitled to a credit or refund merely because he was not liable for *any* part of the tax that was assessed against him. But the principle is broader. When Congress makes a private firm the Internal Revenue Service's "collection agent" (we are not using "agent" in any technical sense), as it has done with the airline tax and other excise taxes, *DuPont Glore Forgan Inc. v. American Tel. & Tel. Co.*,

428 F. Supp. 1297, 1306 (S.D.N.Y. 1977), as well as with payroll taxes, the firm corresponds to an employee of the Service, and a suit for a refund of the taxes that the firm collected—a suit necessarily based on a claim that the taxes were collected in violation of law—is as much a suit for the refund of federal taxes as if it had been brought against the Commissioner of Internal Revenue. (Not that such a suit would lie either, 26 U.S.C. § 7422(f)(1); the only proper defendant is the United States. Our point is only that such a suit would be understood as one for the refund of taxes.) It makes no difference whether the firm is still holding the money it erroneously collected or has passed it on to the IRS. The principal is bound by the agent's act. The IRS has plenty of remedies against its collection agents who fail to remit taxes that they collect. See 26 U.S.C. § 6672(a).

The plaintiff likens this to a case in which a con man, posing as an IRS agent, collects and pockets "taxes" from gullible citizens. The con man's victims would have no action against the IRS, because he was not an agent of the IRS and presumably had not been clothed by it with apparent authority to collect taxes. The victims would have their usual state law remedies against the con man, because they would not be seeking a refund of federal taxes; the con man had not even colorable authority to collect taxes. That is not this case. Southwest, and any customer of Southwest who thought about these matters, had every reason to believe that a last-minute deal between the President and Congress would result in the extension of the tax beyond its December 31 expiration date. The sunset feature of the tax goes back to 1962. Pub. L. No. 87-508, § 5, 76 Stat. 114, 115 (1962). Between 1963 and 1990 Congress had four times extended the air transportation excise tax shortly before (once on the very day) it was due to expire. Pub. L. No. 88-52, § 3(a)(3), 77 Stat. 72 (1963); Pub. L. No. 88-348, § 2(a)(3), 78 Stat. 237 (1964); Pub. L. No. 89-44, § 303(a), 79 Stat. 136, 148 (1965); Pub. L. No. 100-223, § 402(a)(1), 101 Stat. 1486, 1532 (1987); Pub. L. No. 101-508, § 11213(d)(1), 104 Stat. 1388-435 (1990). As

a result, the tax had, as 1995 was drawing to a close, never lapsed since its original imposition in the Revenue Act of 1941, ch. 412, § 554(b), 55 Stat. 687, 721 (1941), though it has now lapsed twice, for after being reimposed in August of 1996 it expired on December 31, 1996, without having been extended. Pub. L. No. 104-188, § 1609(b), 110 Stat. 1755 (1996). It was reimposed on February 28 of this year; and we note that the new statute avoids the refund problem that gave rise to Kaucky's suit by providing that it is applicable not only to transportation beginning during the period covered by the tax (which ends on September 30 of this year) but also to "amounts paid during such period for transportation beginning after such period." Pub. L. No. 105-2, § 2(b)(1), 111 Stat. 4, amending 26 U.S.C. § 4261(g). If the new statute had been in effect when Kaucky bought his ticket, he would have been liable for tax on it.

Had the tax not lapsed at the end of 1995—and, to repeat, it was a good bet, though as it turned out an erroneous one, that it would not lapse—Southwest would have been in trouble had it failed to collect the tax from customers buying tickets in 1995 for travel in 1996. The airline would have incurred expense and ill will in trying to collect the tax from its customers after they had bought their tickets, and might have faced penalties for failing to collect and remit the tax promptly. See 26 U.S.C. § 6656. In these circumstances, Southwest was exercising colorable authority to collect taxes, even though the collection turned out to be in error. It was almost as if the tax had had no expiration date but in 1997 had been repealed retroactively to 1996.

We are told that the larger airlines kept sufficiently complete records of tickets purchased in 1995 for use in 1996 to be able to refund the excise-tax portion of the ticket price to their customers when the tax was not extended. Assuming those airlines had, like Southwest, paid over this portion of the price to the IRS, they would be entitled to a tax credit for the amount of any refunds that they made to these customers. 26 U.S.C. § 6415(a). This was a fine way to proceed, a way more considerate of

the affected customers than Southwest's method, which interpreted as favorably to the plaintiff as the record will allow involved collecting the tax and remitting it to the IRS and requiring the customer if he wanted a refund to file a claim *with the IRS*. But Southwest's way of proceeding was not so outlandish as to strip the airline of the protection that it enjoys from state-law suits challenging actions done by it in its capacity as a collector of federal excise taxes. The plaintiff was, it is true, denied an opportunity to conduct discovery aimed at finding out whether Southwest had been acting in bad faith. He would have liked to show that Southwest pocketed the money it collected for the nonexistent tax rather than turning it over to the IRS. If that is what happened and people who paid the tax later obtained refunds from the IRS for the money retained by its dishonest collection agent, the IRS would have a number of remedies, criminal as well as civil, against Southwest. E.g., 26 U.S.C. §§ 6672(a), 7202; cf. 26 U.S.C. § 7501; *Begier v. IRS*, 496 U.S. 53, 60-62 (1990). But many people would not bother to seek a refund from the IRS—they would not know that the tax had expired, or would not have retained the receipt for their ticket, or would not have enough at stake to warrant the bother of obtaining and filling out and submitting a claim for a refund—and the money those people erroneously paid on account of the nonexistent tax would lodge in Southwest's pocket.

The case just hypothesized in which the authorized agent turns dishonest is intermediate between the case of the imposter, which we said could be brought under state law, and the case of overpayment, which we said could not be. We may assume without having to decide that the intermediate case should be assimilated to the imposter case rather than to the overpayment case, so that the defrauded customers who had not gotten a refund from the IRS would have a claim against Southwest. This assumption does not carry the day for Kaucky. Although his brief speaks in general terms of Southwest's bad faith, the worst it claims is that Southwest was overconfident in believing that the tax would be extended and

as a result failed to take the prudent measures that the larger airlines took to refund the excise taxes that they collected. This kind of error is no different from an error by an internal revenue agent, an employer, or another statutory collection agent in computing the tax that it is required by law to collect. Money collected in error by a lawful agent, public or private, of the Internal Revenue Service can be recovered only from the government, because a claim or suit to collect such money is a claim or suit for a tax refund.

We are mindful that section 6415(c) of the Internal Revenue Code provides that airlines required by section 4261 to collect the air transportation excise tax shall, upon proper application, refund any overcollection of the tax that they have made. This provision may be limited to errors in computation and designed only to spare the taxpayer and the Internal Revenue Service the burden of preparing and processing minuscule claims. *DuPont Glore Forgan Inc. v. American Tel. & Tel. Co., supra*, 428 F. Supp. at 1304-05; *Lehman v. USAIR Group, Inc.*, 930 F. Supp. 912, 915 (S.D.N.Y. 1996). Whatever the provision's precise scope, there is no express authorization for suits by taxpayers to enforce it; no indication that Congress would have wanted the courts to entertain such suits despite the absence of express authorization, cf. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979); *Meghrig v. KFC Western, Inc.*, 116 S. Ct. 1251, 1256 (1996); and a practical reason for the courts not to create such an action: it would throw a monkey wrench into machinery designed to confine suits for the refund of federal taxes to suits in the federal courts against the government in order to protect its private as well as public agents from being whipsawed. See *id.*; *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981). So this suit cannot be saved by recharacterizing it as a suit to enforce section 6415(c). It is a tax refund suit brought against the wrong party. It was properly removed and properly dismissed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: March 20, 1997

BEFORE:

Honorable RICHARD A. POSNER, Chief Judge
Honorable KENNETH F. RIPPLE, Circuit Judge
Honorable ILANA DIAMOND ROVNER, Circuit Judge

No. 96-2736

ROBERT G. KAUCKY, on behalf of himself and all others similarly situated,

Plaintiff-Appellant

v.

SOUTHWEST AIRLINES COMPANY, a Texas corporation, on behalf of itself and all other entities similarly situated,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 96 C 750, James B. Zagel, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Ben Barnow
Barnow and Goldberg, P.C.
105 West Madison Street
Suite 2200
Chicago, IL 60602

Case Number: 1:96-cv-00750
Title: Kaucky v. SW AL Co
Assigned Judge: Honorable James B. Zagel

MINUTE ORDER of 6/14/96 by Hon. James B. Zagel : Plaintiff's motion to alter or [30-1], amend judgment denied [30-2]. Motion for leave to file supplement [29-1], and to supplement motion to alter or amend is granted [29-2]. Motion for reconsideration is denied. Motion to alter or amend judgment is denied. (See reverse of minute order). Mailed notice

This docket entry was made
by the Clerk on June 8, 1996

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by ICMS, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate: James B. Zagel

Case Number: 96 C 750 Date: June 14, 1996

Case Title: KAUCKY V. SOUTHWEST AIRLINES CO.

MOTION: Plaintiff's motion to alter or amend judgment

DOCKET ENTRY:

(1) ☒ Filed motion of [use listing in "MOTION" box above]

* * * * *

(10) ☒ [Other docket entry] Motion denied. Motion (29-1 and 29-2) for leave to file supplement and motion to supplement motion to alter or amend is granted. Motion for reconsideration is denied. Motion to alter or amend judgment is denied.

(11) ☒ [For further detail see order on the reverse of the original minute order form.]

* * * * *

ORDER

Kaucky v. Southwest Airlines
No. 96 C 750 Judge Zagel

The motion to reconsider is denied. The new evidence Kaucky claims would change the result in this case does not change the requirements of 26 U.S.C. § 7422.

/s/ James B. Zagel
United States District Judge

App. 12

[Dated May 16, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT G. KAUCKY, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

SOUTHWEST AIRLINES CO., a Texas corporation, on behalf of itself and all other entities similarly situated,

Defendants.

No. 96 C 750—Honorable James B. Zagel

MEMORANDUM OPINION AND ORDER

Robert Kaucky filed this class action lawsuit against Southwest Airlines in the Circuit Court of Cook County, Illinois. Southwest removed the case to federal court pursuant to 28 U.S.C. §§ 1441 and 1446. Kaucky then moved to have the suit remanded back to the Circuit Court. This Court denied that motion to remand and the subsequent motion to reconsider the motion to remand. Southwest now moves to dismiss this action.

Kaucky represents a class of persons who purchased airline tickets from Southwest before January 1, 1996, for travel after December 31, 1995. Kaucky paid a federal excise tax which was included in the price of his ticket. This excise tax, 10 percent of the ticket price, was collected by Congressional mandate pursuant to 26 U.S.C. § 4261, which imposes a tax on air transportation. However, the

taxes imposed by this section expired on December 31, 1995, and Congress, in the midst of its budget impasse, failed to renew the tax. 26 U.S.C. § 4261(g). Therefore, any transportation that took place after December 31, 1995 was not subject to the tax. Kaucky seeks, on his own behalf and as representative of a class, the return of the excise tax collected by Southwest for travel after December 31, 1995.

Federal law has imposed an excise tax on air transportation for over forty years. Congress has continually extended the effective date for this tax prior to the enabling legislation's expiration dates. Most recently in 1990, Congress extended the effective date of the act from January 1, 1991 to January 1, 1996. As the expiration deadline approached in 1995, the airlines expected Congress to reenact the tax. In fact, in November 1995, the House and Senate passed legislation that extended the federal excise taxes on air transportation for another six years. This legislation, however, also contained a controversial bill that proposed to alter Medicaid and Welfare, and President Clinton vetoed the bill on December 6, 1995. To date, Congress has not passed any legislation that extends the collection of this tax.

The excise tax is used by the Federal Aviation Administration (FAA) to run this country's air traffic control system and make improvements to airports. It was therefore surprising that this legislation was not passed and most air carrier officials expect Congress will reimpose the tax. Yet, because there is no tax in effect for travel that began on January 1, 1996, passengers who paid the tax for these flights are entitled to a refund. Some airlines have assisted passengers in attaining their refunds by crediting their charge accounts. Others, including Southwest, have required passengers to file their claims for refund with the IRS, using IRS form 8849.

Discussion

A complaint should not be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief may be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Leahy v. Board of Trustees of Community College Dist. No. 508, County of Cook, State of Ill.*, 912 F.2d 917, 921 (7th Cir. 1990), quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In analyzing the sufficiency of plaintiff's complaint, the court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff. *Prince v. Rescorp Realty*, 940 F.2d 1104, 1106 (7th Cir. 1991).

1. Tax Refund

Kaucky claims this suit involves no disputable tax matter, but only alleges breach of common law rules. He asserts this suit falls outside the scope of the internal revenue laws because no tax existed when the law expired and thus the money was improperly collected under the "guise of a tax." However, the language of the Internal Revenue Code makes clear that federal law applies even in a case where a tax is alleged to have been "erroneously or illegally assessed or collected." 26 U.S.C. § 7422(a). Furthermore, this Court has twice rejected Kaucky's argument that only common law issues exist, as I denied the motion to remand and the subsequent motion to reconsider based on the fact that federal law is at issue here.

This case boils down to a simple tax refund suit under 26 U.S.C. § 7422. Although it is clear that Southwest was

not entitled to collect the tax for travel occurring in 1996,[1] the Internal Revenue Code creates procedures to follow when a tax has been improperly collected. Section 7422(a) states:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary . . ."

It is patent that a person must file a claim for refund or credit with the Secretary prior to filing a suit in court for recovery of the money. When that claim is ultimately entitled to be filed in court, it may only be maintained against the United States. 26 U.S.C. § 7422(f)(1).

Kaucky has failed to comply with the procedural requirements of Section 7422 by not alleging that he, or any other member of his class, filed a claim for a refund with the Secretary. *Kuznitsky v. United States*, 17 F.3d 1029, 1031 (7th Cir. 1994) (a party seeking a refund must initially file an administrative claim with the IRS). Even if he were entitled to sue, Kaucky has not sued the appropriate party, the United States. *DuPont Glore Forgan Inc. v. American Tel. & Tel. Co.*, 428 F. Supp. 1297, 1303 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1366 (2nd Cir. 1978) ("section 7422(f) means precisely what it says, and that plaintiffs may maintain a tax refund claim only against the government and not against collecting agents").

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[1] Kaucky alleges that Southwest acted in bad faith collecting monies it knew it had no right to collect. This allegation which we take to be true is probably quite unfair considering the history of the air transportation excise tax which has been continually renewed for over forty years until this fiscal year's budget impasse.

Kaucky argues that even if Section 7422 applies to this case, this Court has jurisdiction because an exception to the procedural requirements exists when money is collected in the "guise of a tax." Kaucky cites two cases.

The first, *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1 (1962), involved 26 U.S.C. § 7421 which prohibits courts from entertaining suits seeking injunctions prohibiting the collection of federal taxes. In dicta, the Court found a statutory exception would exist if "under the most liberal view of the law and the facts, the United States cannot establish its claim" and "equity jurisdiction otherwise exists." *Enochs*, 370 U.S. at 7. *Enochs* would grant this exception when "the exaction is merely in 'the guise of a tax.'" *Id.*

The second case, *Econ, Inc. v. Illinois Bell Tel. Co.*, 351 F. Supp. 1087 (N.D. Ill. 1972), also distinguished in dicta between the collection of an excise tax and an exaction in the guise of a tax. The court in *Econ*, did not define this difference because it found there was enough reason to assume the collection was proper as an excise tax. *Econ*, 351 F. Supp. at 1089. Kaucky says rightly that it cannot be established under the most liberal view of the law and the facts that Southwest's exaction was authorized by the Internal Revenue Code. And thus, the exaction was merely in the guise of a tax and therefore the suit may proceed in federal court under *Enochs* and *Econ*.

These cases do not assist Kaucky. First, *Enochs* carved out a narrow exception for suits seeking injunctive relief. There is a significant difference between seeking an injunction against a tax and seeking a refund of a tax. An injunction is possible only when there is no adequate remedy at law to avoid a future or ongoing harm. When one seeks a tax refund the harm is already complete, and

the procedures set up by the Internal Revenue Code provide an adequate remedy at law to obtain a refund. There is no reason to grant an exception to the statute when seeking a tax refund. Unsurprisingly, the judge in *Econ* explicitly stated that he did not "reach the question whether the *Enochs* rule permits recovery of past 'exactions' in addition to an injunction." *Econ*, 351 F. Supp. at 1089.[2]

Finally, Kaucky spends a great deal of time arguing that requiring this claim to proceed under the Internal Revenue Code contradicts the Code's underlying purpose of ensuring the orderly administration of the revenue and revenue laws. Kaucky's argument defeats itself. First, this is not a claim based on common law issues as Kaucky continues to assert, but a claim for a tax refund, a situation the Code was designed to deal with. Second, Kaucky asserts that the IRS gains nothing by overseeing cases with no impact, relation or effect on the revenue laws, and that allowing this suit would save the IRS from excess paperwork and from reviewing individual claims. These arguments are wholly without merit and in fact turn the issue on its head. By attempting to sue in court, Kaucky has simply shifted the burden from the Internal Revenue Service to the federal court system. Kaucky, and all others similarly situated, seeks a simple result in this case, the refund of taxes paid prior to January 1, 1996 for air travel

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[2] Kaucky also asserts that *Econ* indicates suits can be brought against defendants other than the United States. In fact, *Econ* implies just the opposite when it informs the plaintiff how to obtain an authoritative determination on the issue by a federal court. "[H]e may have one by filing a claim for a refund with the Internal Revenue Service and, upon its denial, institut[e] a suit in the district court *against the United States directly as the real party in interest.*" *Econ*, 351 F. Supp. at 1089 (emphasis added).

that occurred after December 31, 1995. There is a simple resolution to this matter, file form 8849 with the IRS. It is an easy form to fill out, and like thousands of other airline passengers in Kaucky's position, he is almost certain to get his refund. The IRS procedures are efficient and of minimal cost. On the contrary, by insisting on a lawsuit, resolution of this matter has been delayed at significantly greater expense to both the parties involved and the judicial system.

2. Preemption

Kaucky asserts common law claims for breach of contract and conversion. However, these claims are preempted by 49 U.S.C. § 41713(b)(1) (1995) (formerly the Airline Deregulation Act of 1978, 49 U.S.C. § 1305(a)(1)). Section 41713(b)(1) provides:

> a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of an air carrier . . . .

Both the breach of contract and conversion claim "relate" to Southwest's ticket prices within the meaning of this section. Both claims expressly refer to the collection of the air transportation excise tax. The excise tax, which is ten percent of the ticket price, 'relates to price' because it directly impacts the ticket price. *Statland v. American Airlines, Inc.*, 998 F.2d 539, 542 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 603 (1993) (challenged practice of withholding ten percent of federal tax on canceled tickets relates to rates.)

Kaucky argues that the breach of contract claim falls within the exception drawn by the Supreme Court in *American Airlines Inc. v. Wolens*, 115 S.Ct. 817, 826 (1995), which does not preempt a claim for breach of a

contract term when set by the airline itself. Kaucky asserts that the collection of money was not imposed by federal statute or regulation, but was a self-imposed undertaking by Southwest. While the air transportation excise tax did expire for travel beginning on January 1, 1996, Southwest only collected the money in anticipation of the tax being revived. When the law imposing the excise tax ultimately expired on December 31, 1995, Southwest stopped charging for it. Thus, while the money may have been improperly collected, it related to airline ticket prices.

Kaucky finally argues that the conversion claim is protected by the holding in *Travel All Over the World, Inc. v. The Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996), because the conversion count makes no express reference to rates (price), routes, or services. Yet I have already concluded that this count does refer to price since it expressly refers to the collection of the excise tax.

Conclusion

Kaucky's sole remedy is to file for a refund with the IRS. Approximately 33,000 other individuals, who paid this excise tax in 1995 and flew in tax-free 1996, have already filed their refund claims with the United States. Kaucky must follow the same route. Because Kaucky has not yet filed his claim for a refund with the IRS, and because his only source of relief is against the United States, Southwest's motion to dismiss is granted.

Enter:

/s/ James B. Zagel
United States District Judge

Date: May 16, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

ROBERT G. KAUCKY

v. Case No. 96 C 750

SOUTHWEST AIRLINES CO.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED defendant's motion to dismiss for lack of jurisdiction is granted. This case is dismissed with prejudice and without costs.

May 16, 1996
Date

H. Stuart Cunningham
Clerk

/s/ Donald R. Walker
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Ben Barnow
Barnow and Goldberg, P.C.
105 West Madison Street
Suite 2200
Chicago, IL 60602

Case Number: 1:96-cv-00750
Title: Kaucky v. SW AL Co
Assigned Judge: Honorable James B. Zagel

MINUTE ORDER of 2/22/96 by Hon. James B. Zagel : Status hearing set for 10:00 4/18/96. Denying motion to remand to Circuit Court of Cook County [10-1], Denying motion and for attorney fees [10-2] and costs [10-3]. Service of motion to dismiss for lack of jurisdiction plaintiff's class complaint [8-1] due 2/26/96. Service of answer brief due 3/21/96. Service of reply to answer brief due 4/4/96. No notice (rm)

This docket entry was made
by the Clerk on March 3, 1996

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 15, 1997

Before

Honorable RICHARD A. POSNER, Chief Judge
Honorable KENNETH F. RIPPLE, Circuit Judge
Honorable ILANA DIAMOND ROVNER, Circuit Judge

ROBERT G. KAUCKY, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

No. 96-2736 v.

SOUTHWEST AIRLINES COMPANY, on behalf of itself and all others similarly situated,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 750—James B. Zagel, *Judge*.

ORDER

On April 3, 1997, plaintiff-appellant filed a petition for rehearing. All the judges on the original panel have voted to deny the petition. The petition is therefore DENIED.

Supreme Court, U. S.
FILED
SEP 24 1997
CLERK

No. 97-347

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT G. KAUCKY,

Petitioner,

v.

SOUTHWEST AIRLINES CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN FEDO
Counsel of Record
NEAL, GERBER & EISENBERG
Two North LaSalle Street
Suite 2200
Chicago, Illinois 60602
(312) 269-8000

Attorney for Respondent

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

14 pp

QUESTION PRESENTED

Whether the decision of the United States Court of Appeals for the Seventh Circuit, holding that petitioner's claim for a tax refund may be asserted only against the government, was consistent with the Internal Revenue Code.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties. Respondent Southwest Airlines Co. is a corporation; it is not the subsidiary of any other corporation, and it has no nonwholly-owned subsidiaries.

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STATEMENT OF THE CASE

The petition in this case is one of two that are currently pending which seek this Court's review of similar decisions in, respectively, the Seventh and Fifth Circuit Courts of Appeals. In each case the court of appeals upheld the dismissal of putative class action claims against Southwest Airlines Co. ("Southwest"). In the present case, the Seventh Circuit affirmed the district court's judgment dismissing plaintiff Robert G. Kaucky's ("Kaucky") complaint for lack of subject matter jurisdiction.[1] In No. 97-374, the petition seeks review of the Fifth Circuit's decision in *Sigmon v. Southwest Airlines Co.*, 110 F.3d 1200 (1997), in which the court affirmed summary judgment for Southwest.[2]

The claims in both cases arose from the collection by Southwest of a ten percent excise tax on domestic air transportation occurring on or before December 31, 1995, as provided in section 4261 of the Internal Revenue Code, 26 U.S.C. § 4261. The plaintiffs in both cases alleged that Southwest had collected taxes on tickets purchased in 1995 for travel in 1996 and had failed to refund the ten percent assessment when the statute lapsed on January 1, 1996. Section 4261 and the anomalous legislative circumstances concerning its nonrenewal in December, 1995, are discussed in detail in the opinions of the Seventh and Fifth Circuits, *Kaucky* App. 1-2,

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[1] The decision of the Seventh Circuit in *Kaucky v. Southwest Airlines Co.* is reported at 109 F.3d 349 (1997). It is reprinted in the petition at App. 1-9, and all citations herein to the opinion are to the appendix.

[2] Southwest will file a separate brief in opposition to the *Sigmon* petition.

5-6, and *Sigmon* App. A-2 – A-3, respectively. The procedural facts relevant to the *Kaucky* petition are fully and accurately stated in the Seventh Circuit's opinion, to which the Court is respectfully referred.

REASONS FOR DENYING THE WRIT

The principal question before the Seventh Circuit was "whether in suing Southwest, passenger-taxpayer Kaucky was seeking a tax refund." App. 3. Kaucky argued strenuously on appeal that, because section 4261 of the Internal Revenue Code was ineffective after December 31, 1995, the ten percent surcharge on his ticket was not a tax and, accordingly, he was not bound by the Code's tax refund procedures. In deciding the case, the court noted that, "[i]n a literal sense, this is not a suit for a refund of taxes, . . . [b]ut we do not think the literal sense is the right sense." App. 3-4. The court then held, "Money collected in error by a lawful agent, public or private, of the Internal Revenue Service can be recovered only from the government, because a claim or suit to collect such money is a claim or suit for a tax refund." App. 8.

In his petition, Kaucky has effectively abandoned his previous argument and does not seriously dispute the Seventh Circuit's determination that his claim was a tax refund suit. Instead, he now argues that the court erred in not devising new avenues for seeking tax refunds. For the following reasons, the questions presented in Kaucky's petition do not merit this Court's review.

1. The First Question Raised in the Petition Is Not Presented by the Case, Because the Seventh Circuit's Decision Is Not in Conflict with Any Other Authority.

The Seventh Circuit's decision in this case conflicts with no other authority. Several courts have recently considered whether taxpayers may pursue refund claims against airlines for charges erroneously assessed under section 4261 of the Internal Revenue Code. In each case, the taxpayer's right has been held to be limited to a claim for a refund from the Internal Revenue Service followed by a suit against the United States. *Sigmon v. Southwest Airlines Co.*, 110 F.3d 1200 (5th Cir. 1997); *Lehman v. USAir Group, Inc.*, 930 F. Supp. 912 (S.D.N.Y. 1996); *Brennan v. Southwest Airlines Co.*, No. C96-1841-VRW (N.D. Cal. Sept. 6, 1996), *appeal docketed*, No. 96-17053 (9th Cir. Nov. 6, 1996); *Eisenman v. Continental Airlines, Inc.*, No. 96-1368 (D. N.J. July 23, 1997). *See also DuPont Glore Forgan Inc. v. American Tel. & Tel. Co.*, 428 F. Supp. 1297 (S.D.N.Y. 1977); *Burda v. M. Ecker Company*, 954 F.2d 434 (7th Cir. 1992); *Edgar v. Inland Steel Co.*, 744 F.2d 1276 (7th Cir. 1984).

Further, the Seventh Circuit's decision is not even in "conflict" with the tax refund procedures of the Internal Revenue Code, as Kaucky contends. Kaucky states that, under section 6415 of the Internal Revenue Code, 26 U.S.C. § 6415, "carriers are *allowed* to remit monies to consumers from whom the carrier made a collection." Pet. 12 (emphasis added). He alleges that "the IRS had requested airlines to follow 26 U.S.C. § 6415 . . . ." *Id.*

There is, however, no conflict between section 6415 and the Seventh Circuit's decision. The court did not hold

that an air carrier is prohibited from making direct refunds to passengers. Indeed, the court specifically noted that larger airlines had availed themselves of the alternative procedure provided under section 6415, commenting that "[t]his was a fine way to proceed . . . ." App. 6. But the court also recognized that the refund procedure under section 6415 is neither exclusive nor mandatory. It declined to hold that Southwest was *obliged* to process refunds of erroneously collected taxes, and it concluded that the taxpayer had no right of action against Southwest under section 6415. App. 8.

Far from conflicting with section 6415, the decision of the Seventh Circuit reflects careful consideration of that statute and its limited role in the Internal Revenue Code's refund procedures which, as the court stated, are "designed to confine suits for the refund of federal taxes to suits in the federal courts against the government in order to protect its private as well as public agents from being whipsawed." App. 8; citing *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981).

The "conflict" asserted by Kaucky is illusory. The decision of the Seventh Circuit is entirely consistent with the Internal Revenue Code and with the numerous cases in which the Code's pertinent provisions have been construed. The first question presented in the petition thus is no issue at all and does not warrant this Court's review.

2. The Seventh Circuit Properly Declined To Recognize "Exceptions" to the Internal Revenue Code's Established Refund Procedures or To Fashion New Remedies Outside the Statute.

The second question Kaucky presents for the Court's review is whether the Seventh Circuit ought to have recognized "exceptions" to the Internal Revenue Code's tax refund procedures and should have found an "implied cause of action" under section 6415. Extraordinary new measures are required, Kaucky argues, for three reasons: 1) there is otherwise "no means to police corporate entities" that may try to "manipulat[e] the tax system"; 2) the Internal Revenue Service lacks "assistance in properly remitting wrongfully collected funds to the public"; and 3) passengers who paid the tax have "no adequate access" to refunds. Pet. 15.

At best, Kaucky's argument is a call for legislative action. If the statutory scheme were deficient in some way, it would not be the judiciary's role to engineer the solution.[3] Moreover, the federal tax system is not de-

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[3] Kaucky's twin arguments for judicial involvement—*i.e.*, that the exception recognized in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), ought to be applied here, and that the Seventh Circuit failed to determine, under *Cort v. Ash*, 422 U.S. 66 (1975), whether additional remedies are implied by the statute—are misguided. The *Enochs* exception applies to actions barred by the Anti-Injunction Act, 26 U.S.C. § 7421 (that is, actions seeking to restrain collection of a tax), and not to cases where taxpayers are seeking refunds. In *Bob Jones University v. Simon*, 416 U.S. 725, 742-47 (1974), the Court firmly rejected *any* extension of the *Enochs* exception, and there is no reason for the Court to revisit the question here. And while the Seventh Circuit rejected Kaucky's plea for an implied remedy without citing *Cort*, it *is* clear that the

(continued...)

ficient in the ways asserted by Kaucky and is not in need of the extrapolated remedies he favors.

The Seventh Circuit made a point of emphasizing that the Internal Revenue Code provides ample policing mechanisms, "criminal as well as civil," that can be used against collection agents. App. 7, *citing* 26 U.S.C. §§ 6672(a), 7202, 7501 and *Begier v. IRS*, 496 U.S. 53, 60-62 (1990). *See also* App. 5.

The court also recognized that, while alternative measures might spare the Internal Revenue Service "the burden of processing minuscule claims" (App. 8), shifting of the burden to the government's private agent could leave the agent unfairly "caught in the middle. We do not think that such a result was intended or would be consistent with the system of federal tax collection that Congress has created." App. 4.

Kaucky's assertion that, absent a new judicial remedy, "millions of customers will be left with no remedy" (Pet. 19) is simply untrue. Any passenger may file an administrative claim with the Internal Revenue Service. *See* 26 C.F.R. § 601.403(d). Thereafter, litigation may be brought against the government. 26 U.S.C. § 7422. The district court found that the administrative procedures "are efficient and of minimal cost," and that "like thousands of other airline passengers . . . , [Kaucky] is almost

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[3] (...continued)
question was analyzed appropriately and in accordance with this Court's more recent decisions. *See* App. 8, *citing Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979); and *Meghrig v. KFC Western, Inc.*, 116 S.Ct. 1251, 1256 (1996).

certain to get his refund." App. 18. The court of appeals speculated that "many people would not bother to seek a refund" (App. 7), but deciding to forego an established remedy is a far cry from having no remedy at all.

The only real question raised by Kaucky's suit is whether the judiciary should create a new cause of action in response to the anomalous circumstances surrounding a temporary lapse in the federal excise tax on air travel. Significantly, when Congress re-imposed the tax (*see* Pub. L. No. 104-188, § 1609(b), 110 Stat. 1755, 1841 (1996); Pub. L. No. 105-2, § 2(b)(1), 111 Stat. 4, 5 (1997)), it did not deem new remedies necessary. None of the several courts that have considered the question have found that a new remedy—one that would be at odds with the established statutory scheme—is warranted.

3. The Availability of Discovery, or the Lack Thereof, Did Not Affect the Outcome in This Case.

Kaucky complains at length that he "was denied the opportunity to conduct any discovery" in this case. App. 8-11. That assertion is both erroneous and immaterial.

The district court expressly authorized Kaucky to commence limited discovery on an expedited basis while Southwest's motion to dismiss was pending. Kaucky failed to avail himself of this opportunity. He did, however, obtain copies of depositions and other discovery materials provided in *Sigmon v. Southwest Airlines Co.*, which then was pending in the Northern District of Texas, and he was permitted to file them and make use

of them in this case. *See* App. 10-11. It is not accurate to suggest that discovery was denied.

It also is disingenuous to suggest that additional discovery would have altered the result below, inasmuch as Kaucky has not indicated what facts, if discovered, would compel a different outcome. As the Seventh Circuit noted, "the worst [Kaucky] claims is that Southwest was overconfident in believing that the tax would be extended" and thus erred in its handling of the matter. App. 7-8. Such an error, the court concluded, is no different from an agent's technical error, and is not ground for a suit against the collecting agent rather than the government. *Id.* Additional fact discovery would not have altered the conclusions of the courts below because it could not have cured the fundamental legal infirmity of the asserted claim.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

STEPHEN FEDO
Counsel of Record
NEAL, GERBER & EISENBERG
Two North LaSalle Street
Suite 2200
Chicago, Illinois 60602
(312) 269-8000

Attorney for Respondent